

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JACOB CALANNO,

CASE NO. 07CV2052 BTM (POR)

Plaintiff,

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

TERRA VAC CORPORATION, ET. AL.,

Defendant.

On October 29, 2007, Plaintiff Jacob Calanno brought suit against Defendants Terra Vac Corporation and Terra-Vac Inc. alleging (1) violation of the False Claims Act; (2) misrepresentation to potential employers; and (3) libel and slander per se. Defendants have brought a motion to dismiss these three causes of action on various grounds pursuant to Federal Rule of Civil Procedure Rule 12(b)(6). For the reasons set forth below, the Court DENIES Defendants' motion to dismiss.

FACTUAL BACKGROUND

The following facts are taken from Plaintiff's Complaint. The Court makes no findings as to the truth of these allegations.

Plaintiff worked for a series of companies, including Defendants, which contracted with the U.S. Navy to perform environmental tasks at the El Centro Naval Air Facility (“Airbase.”) By 2005, Plaintiff was a senior incinerator operator and field operations supervisor. As part of the contract with the Navy, Defendants dug wells and removed water which contained contaminant vapors such as lead, mercury, aviation fuel and sewage by use of “slurp tubes.”

1 One of Plaintiff's duties was to separate and incinerate the contaminant vapors. The slurp
2 tubes also brought up debris, which was trapped in a filter screen, and needed to be
3 manually cleaned.

4 James Keegan, Defendants' project manager, directed Plaintiff to raise the slurp tubes
5 three feet off the bottom of the wells. Raising the slurp tubes benefitted Defendants by
6 reducing the debris trapped in the filter and thereby cutting filter supply costs and labor costs.
7 It also, however, resulted in an inability to bring up the toxic vapors that Plaintiff was
8 employed to incinerate. Keegan also ordered that the gas used for calibrating the meter that
9 monitored contaminants be changed from methane to hexane, which artificially inflated the
10 vapor removal performance numbers reported to the Navy. Defendants had a performance-
11 based contract with the Navy and renewal of that contract was also based on performance.
12 Keegan ordered the manipulation of the slurp tube and misrepresented the performance and
13 effectiveness of the vapor removal to the Navy in order obtain a positive performance review
14 and a renewal of Defendants' contract with the Navy.

15 In late September or early October 2005, Plaintiff discovered that Defendants'
16 emission levels were not in compliance with regulations of the California Air Pollution Control
17 Board. Plaintiff immediately reported this to Keegan on his daily report form.

18 Because Plaintiff believed that Defendants' were misrepresenting its emissions to the
19 Navy, he informed the Navy of Defendants' fraudulent activities on October 5, 2005.
20 Although Plaintiffs' report was anonymous, few, if any, other employees of Defendants could
21 have known the facts contained in the anonymous report. The Navy subsequently hired
22 Bechtel Co. to conduct an independent audit of Defendants' activities. Bechtel's report
23 confirmed Plaintiff's concerns.

24 On October 26, 2005, Keegan informed Plaintiff that he was being terminated. His last
25 day of work was October 28, 2005.

26 DISCUSSION

27 A motion to dismiss for failure to state a claim will be denied unless it appears that "no
28 relief could be granted under any set of facts that could be proved consistent with the

1 allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Fidelity Financial Corp. v.
 2 Federal Home Loan Bank of San Francisco, 792 F.2d 1432, 1435 (9th Cir. 1986).

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4 A. False Claims Act

5 Defendants argue that Plaintiff's first cause of action should be dismissed because
 6 he failed to plead the elements required for retaliation under the False Claims Act. "Congress
 7 added 31 U.S.C. § 3730(h) to the [False Claims Act] in 1986 to protect 'whistleblowers,'
 8 those who come forward with evidence their employer is defrauding the government, from
 9 retaliation by their employer." U.S. ex. rel. Hopper v. Anton, 91 F.3d 1261, 1269 (9th Cir.
 10 1996). Pursuant to 31 U.S.C. § 3730(h), the employee must show the following: "1) the
 11 employee must have been engaging in conduct protected under the Act; 2) the employer
 12 must have known that the employee was engaging in such conduct; and 3) the employer
 13 must have discriminated against the employee because of her protected conduct." Id.

14 Contrary to Defendants' arguments, the Court finds that Plaintiff has sufficiently pled
 15 all three of the above elements for a whistleblower cause of action under the False Claims
 16 Act. Plaintiff informed a government official that Defendants were defrauding the government
 17 by misrepresenting its performance regarding toxic vapor removal and the emission levels
 18 generated by the Airbase. In doing so, Plaintiff engaged in exactly the type of activity that
 19 the retaliation provisions of the False Claims Act were designed to protect.¹ Wang v. FMC
 20 Corp., 975 F.2d 1412, 1419 (9th Cir. 1992) ("The paradigm qui tam plaintiff is the
 21 whistleblowing insider.") As Defendants concede, the filing of a qui tam action under the
 22 False Claims Act is not necessary to obtain whistleblower protection under its provisions.
 23 U.S. ex. rel. Yesudian v. Howard University, 153 F.3d 731 (D.C. Cir. 1998). Plaintiff reported
 24 his allegations of fraud and therefore acted in furtherance of an action under the False
 25 Claims Act.

26 Plaintiff's complaint is also sufficient to allege that his employer knew he was
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28 ¹ The cases cited by Defendants are inapposite as they deal with the sufficiency
 of investigation activities by plaintiffs who did not report fraud to a government official.

1 engaging in protected conduct. Although Plaintiff reported Defendants' fraudulent activities
 2 to the Navy anonymously, the allegations regarding the limited availability of the information
 3 contained in the report and the proximity in time between the anonymous report and
 4 Plaintiff's termination are sufficient to plead that Defendants knew of Plaintiff's conduct.
 5 Finally, it is undisputed that Plaintiff alleges that his termination was a result of his report to
 6 the Navy. For the reasons set forth above, the Court concludes that Plaintiff has
 7 sufficiently plead a claim for retaliation under the False Claims Act. The Court therefore
 8 DENIES Defendants' motion to dismiss Plaintiff's first cause of action.

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10 B. Malice

11 Defendants argue that Plaintiff's second cause of action for violations of Labor Code
 12 §§ 1050 and 1054 and third cause of action for libel and slander should be dismissed
 13 because (1) the allegedly false statements were privileged; and (2) Plaintiff failed to properly
 14 plead malice as required for liability for privileged statements. The Court disagrees.

15 Labor Code §§ 1050 and 1054 establish liability for an employer who "after having
 16 discharged an employee from the service of such person or after an employee has voluntarily
 17 left such service, by any misrepresentation prevents or attempts to prevent the former
 18 employee from obtaining employment." Plaintiff's second cause of action is, therefore,
 19 similar to his third cause of action which alleges slander and libel. Both causes of action are
 20 subject to the qualified immunity privilege set forth in Civil Code § 47. O'Shea v. General
Telephone Co., 193 Cal.App.3d 1040, 1047 (1987).

22 California Civil Code § 47 provides that a

23 privileged publication or broadcast is one made . . . In a communication, without
 24 malice, to a person interested therein, (1) by one who is also interested, or (2) by one
 25 who stands in such a relation to the person interested as to afford a reasonable
 26 ground for supposing the motive for the communication to be innocent, or (3) who is
 27 requested by the person interested to give the information. This subdivision applies
 to and includes a communication concerning the job performance or qualifications of
 an applicant for employment, based upon credible evidence, made without malice, by
 a current or former employer of the applicant to, and upon request of, one whom the
 employer reasonably believes is a prospective employer of the applicant.

28 Where the existence of privilege is disclosed on the face of the complaint, "malice is

1 not presumed, and in order to state a cause of action the pleading must contain affirmative
 2 allegations of malice in fact." Jackson v. Underwriters' Report, 21 Cal. App. 2d 591, 593
 3 (1937).

4 Plaintiff's complaint alleges that Defendants misrepresented Plaintiff's performance
 5 and reasons for termination to potential employers, to the U.S. Navy, and to Bechtel
 6 investigators. Because Plaintiff's allegations do not specify the exact circumstances
 7 surrounding these misrepresentations, it is unclear whether these communications were
 8 privileged. For example, it is unclear whether Defendants allegedly made misrepresentations
 9 in response to a potential employer's request for information or Defendants engaged in
 10 unsolicited communications with employers in Plaintiff's industry defaming Plaintiff. Even
 11 assuming that privilege was apparent on the face of the complaint, the Court finds that
 12 Plaintiff's complaint is sufficient to allege malice. Plaintiff alleges in his complaint that
 13 Defendants terminated him in retaliation for his whistleblowing activities and "in order to
 14 establish Plaintiff as a scapegoat for its own wrongdoing." (Complaint ¶ 23) These
 15 allegations are sufficient to plead that Defendants' alleged representations regarding
 16 Plaintiff's job performance and reasons for termination were intentionally false and, therefore,
 17 malicious. Noel v. River Hills Wilsons, Inc., 113 Cal. App. 4th 1363, 1370 (2003) ("The malice
 18 necessary to defeat a qualified privilege is . . . established . . . by a showing that the
 19 defendant lacked reasonable grounds for belief in the truth of the publication and therefore
 20 acted in reckless disregard of the plaintiff's rights.") Because the Court concludes that
 21 Plaintiff's pleadings were sufficient to plead Defendants' malice, it therefore DENIES
 22 Defendants' motion to dismiss the second and third causes of action on that ground.

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24 C. Statute of Limitations

25 Finally, Defendants argue that Plaintiff's second and third causes of action for
 26 misrepresentation to a prospective employer and defamation are barred by the statute of
 27 limitations because Plaintiff does not allege statements made within one year of filing suit.

28 The Court agrees with Defendants that the applicable statute of limitation for both

1 causes of action is one year pursuant to California Code of Civil Procedure § 340(a). See
 2 Walker v. Boeing Corp., 218 F. Supp. 2d 1177, 1185 n.4 (C.D. Cal. 2002) (“Labor Code
 3 section 1050 claims are similar to claims for defamation or tortious infliction of emotional
 4 distress and are governed by the same one-year limitations period.”) Contrary to Plaintiff’s
 5 argument, the applicable statute of limitations is not three years for “an action upon a liability
 6 created by statute, other than a penalty or forfeiture.” By providing for treble damages,
 7 §1054 provides for a penalty and therefore the three year statute of limitations does not
 8 govern actions under this provision. See Cal. Labor Code § 1054 (“In addition to and apart
 9 from the criminal penalty provided any person or agent or officer thereof, who violates any
 10 provision of sections 1050 to 1052, inclusive, is liable to the party aggrieved, in a civil action,
 11 for treble damages.”)

12 Plaintiff’s complaint does not specify the timing of the alleged misrepresentations.
 13 Because Plaintiff does not limit his complaint to misrepresentations that occurred outside of
 14 the one-year statute of limitations, the Court cannot find that no relief can be granted on the
 15 facts alleged by Plaintiff. The Court therefore DENIES Defendants’ motion to dismiss
 16 Plaintiff’s second and third causes of action on this ground.²

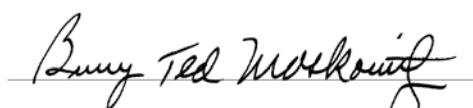
17 CONCLUSION

18 For the reasons set forth above, the Court DENIES Defendants’ motion to dismiss
 19 Plaintiff’s complaint.

20 IT IS SO ORDERED.

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22 DATED: May 22, 2008



23
 24 Honorable Barry Ted Moskowitz
 25 United States District Judge
 26

27 ² Defendants do not appear to dispute that the Plaintiff’s first cause of action was
 28 brought in a timely manner. In any case, the Court finds that Plaintiff’s filed his False Claims
 Act claim within two years as required. Although the filing was technically a few days outside
 the two year statute, Plaintiff correctly points out that the courts were closed during that time
 period due to the San Diego wildfires.

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